IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

**No. 271**

CHARLES H. ALBERS, AS RECEIVER OF WOODLAWN TRUST AND SAVINGS BANK, A CORPORATION,

*Petitioner,*

*vs.*

JAMES A. FARLEY, HENRY MORGENTHAU, JR., AND ROBERT H. JACKSON, AS TRUSTEES OF THE POSTAL SAVINGS SYSTEM; WILLIAM A. JULIAN, AS TREASURER OF THE UNITED STATES OF AMERICA AND WILLIAM A. JULIAN, AS TREASURER OF THE BOARD OF TRUSTEES OF THE POSTAL SAVINGS SYSTEM,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

HOMER D. DINES,
122 S. Michigan Ave.,
Chicago, Illinois,

LLEWELLYN A. LUCE,
937 Munsey Bldg.,
Washington, D. C.,
*Counsel for Petitioner.*

WARREN H. ORR,
*Of Counsel.*

PRINTED BY CHICAGO LAW PRINTING CO.

## SUBJECT INDEX.



### TABLE OF CASES.

PAGE

TABLE OF CASES (CONTINUED).

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

---

**No.**

---

CHARLES H. ALBERS, AS RECEIVER OF WOODLAWN TRUST AND SAVINGS BANK, A CORPORATION,

*Petitioner,*

*vs.*

JAMES A. FARLEY, HENRY MORGENTHAU, JR., AND ROBERT H. JACKSON, AS TRUSTEES OF THE POSTAL SAVINGS SYSTEM; WILLIAM A. JULIAN, AS TREASURER OF THE UNITED STATES OF AMERICA AND WILLIAM A. JULIAN, AS TREASURER OF THE BOARD OF TRUSTEES OF THE POSTAL SAVINGS SYSTEM,

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

---

### PETITION.

*To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:*

The petitioner, Charles H. Albers, as Receiver of Woodlawn Trust and Savings Bank, a corporation, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above entitled cause

on the 29th day of April, 1940, reversing the decree of the District Court of the United States for the District of Columbia.

**Opinions Below.**

The findings of fact and conclusions of law of the District Court were promulgated on April 14, 1938, and appear in the record at pages 21 to 31, both inclusive. The opinion of the Court of Appeals for the District of Columbia appears in the record at pages 113 to 119, both inclusive, but has not yet been reported.

**Jurisdiction.**

The judgment of the Court of Appeals for the District of Columbia was entered on April 29, 1940, (R. 120). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U.S.C.A. 347.)

**Statement.**

The Woodlawn Trust and Savings Bank is an Illinois banking corporation, organized under the laws of the State of Illinois during the year 1905 (R. 22). In 1932 the State Auditor of Public Accounts of Illinois found that the capital stock of the bank was impaired and thereupon took control of the bank and appointed a receiver (R. 22). Charles H. Albers is the present receiver and the petitioner herein (R. 21). From 1911 until the closing of the bank in 1932 the bank had been a depository of postal savings funds (R. 22) and on the date of its closing held deposits of such funds to the amount of $454,793.04 (R. 25). To secure the repayment of deposits of postal savings funds, the bank at various times from 1911 to 1932, pledged, turned over and delivered to the Treasurer of the United States

(who is ex-officio Treasurer of the Board of Trustees of the Postal Savings System (R. 2)) various bonds which were a part of the assets of the bank (R. 22). As of April 14, 1938, William A. Julian, as Treasurer of the United States (ex-officio Treasurer of the Board of Trustees of the Postal Savings System), had possession of certain pledged bonds of the bank in the aggregate principal amount of $457,500 (R. 22-25). He had also received after the closing of the bank and had credited to the Board of Trustees of the Postal Savings System $106,657.96 principal and interest paid on bonds which had been pledged by the bank to secure deposits of postal savings funds. Of said money $16,000 represented the proceeds of redeemed bonds and $90,657.96 represented interest (R. 25).

On October 28, 1935, suit was instituted in the District Court of the United States for the District of Columbia by William L. O'Connell (petitioner's predecessor) as receiver of the bank against James A. Farley, Henry Morgenthau, Jr., and Homer S. Cummings, as Trustees of the Postal Savings System; William A. Julian as Treasurer of the United States and William A. Julian as Treasurer of the Board of Trustees of the Postal Savings System (R. 1), respondents herein, for the recovery of the pledged bonds and the $106,657.96 in money.

The basis of the suit was that under the decisions of the Supreme Court of Illinois (the highest court of that State), banks incorporated under the laws of the State of Illinois since the year 1887 have had no power to pledge assets to secure deposits, and that such pledging was *ultra vires*, against the public policy of the State of Illinois, and void. (*People* v. *Wiersema State Bank*, 361 Ill. 75, 197 N. E. 537; *People* v. *Cairo-Alexander Bank*, 363 Ill. 589, 2 N. E. (2d) 889.) Before those decisions of the Supreme Court of Illinois, this Court in *Marion* v. *Sneeden*, 291 U. S. 262, ap-

proved the conclusion reached by the United States Circuit Court of Appeals, Seventh Circuit, in *Sneeden* v. *City of Marion, Illinois,* 64 F. (2d) 721, that the State of Illinois had not conferred upon its banks the power to pledge assets to secure deposits of political subdivisions of the State, but said (p. 271) that an authoritative determination of the question could be given only by the highest court of the State; which authoritative determination by the highest court of the State was given in *People* v. *Wiersema State Bank, supra.*

The District Court held that the Woodlawn Trust and Savings Bank had no power or authority, under the laws of the State of Illinois, to pledge any of its assets to secure deposits of postal savings funds, and that the purported pledging of part of its assets, consisting of bonds, by said bank with the Treasurer of the United States to secure deposits of postal savings funds was *ultra vires,* illegal and void and contrary to the public policy of the State of Illinois (R. 29). The court also held that this is not a suit against the United States and that the United States is not a necessary or indispensable party to this suit (R. 29). The court therefore ordered the defendant William A. Julian, as Treasurer of the United States, to turn over and deliver to the petitioner herein the pledged bonds still held by him, and ordered the Trustees of the Postal Savings System to pay, or cause to be paid, to the petitioner herein, out of postal savings funds in their possession or under their control, $106,657.96 on account of moneys received by them or credited to their account by the Treasurer of the United States since the closing of the bank from principal of and interest on bonds pledged by the bank to secure deposits of postal savings funds; provided that simultaneously with such payment the receiver pay to said Trustees the amount of dividends payable to the Trustees as general creditors of the bank (R. 31-34).

The respondents appealed to the United States Court of Appeals for the District of Columbia. On April 29, 1940, the Court of Appeals reversed the decree of the District Court on the sole ground that the United States are necessary and indispensable parties to the suit (R. 119), and held that it was, therefore, without jurisdiction either to compel the Treasurer of the United States to surrender the bonds or to compel the Trustees of the Postal Savings System to make any payments out of moneys deposited in the Treasury of the United States earmarked as postal savings funds, which the Trustees controlled under the terms of the pertinent statute (R. 113-119).

## Question Presented.

This petition therefore presents the sole question whether the United States are indispensable parties to the suit instituted by the petitioner herein.

## Statutes Involved.

The statutes involved are set forth in full in the Appendix.

## Specification of Errors To Be Urged.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the United States are necessary and indispensable parties to the suit brought by the petitioner for the recovery of the bonds and the payment of the moneys involved.

2. In holding that the deposit of the postal savings funds in the Woodlawn Trust and Savings Bank constituted the deposit of money of the United States.

3. In holding that even if the money deposited in the bank was not money belonging to the United States, nevertheless the deposit of the money created a debt due the United States.

4. In failing to hold that the petitioner herein was entitled to recover the securities illegally pledged with the Treasurer of the United States (ex-officio Treasurer of the Board of Trustees of the Postal Savings System) even though the deposit of postal savings funds with the bank created a debt due the United States.

5. In holding that it was without jurisdiction either to compel the Treasurer of the United States to surrender the bonds or to compel the Trustees of the Postal Savings System to make any payments out of moneys deposited in the Treasury of the United States earmarked as postal savings funds, and controlled by the Trustees of the Postal Savings System under the terms of the pertinent statute.

6. In reversing the decree of the District Court of the United States for the District of Columbia ordering the Trustees of the Postal Savings System to pay or cause to be paid to the petitioner herein, out of postal savings funds in their possession or under their control, $106,657.96 on account of moneys received by said Trustees or credited to their account by the Treasurer of the United States since the closing of the Woodlawn bank.

7. In reversing the decree of the District Court of the United States for the District of Columbia in favor of the petitioner and in failing to affirm said decree in all respects.

**Reasons for Granting the Writ.**

I.

This case involves matters of substantial importance in the administration of the Postal Savings Act (36 Stat. 814) and important questions of Federal law which should be settled by this Court.

II.

The decision of the United States Court of Appeals for the District of Columbia is in direct conflict with the decision of the Court of Claims of the United States in *Annie Leka, Administratrix of the Estate of Mike Mesich* v. *The United States,* 69 Court of Claims Reports 79 (No. F-138, decided February 10, 1930).

In the *Leka case,* suit was brought in the Court of Claims to recover, from the United States, postal savings deposits which had been made in a depository office of the Postal Savings System. The Attorney General of the United States successfully defended that suit on the ground that the United States were not proper parties defendant and that a judgment could not be entered by the Court of Claims against the United States for postal savings deposits. The Court of Claims said at page 87 of 69 Court of Claims Reports:

> "Before passing to a discussion of the regulations promulgated by the board of trustees to effectuate the purposes enumerated, it may be well to pause here and note that there was created by this act a trust with named trustees, the deposits to be held as trust funds and to be held within the State or community where the deposit was made, and the withdrawals or repayments to be made at the place of deposit and from deposits within the State or community. Interest

was to be paid on the deposits, and as provided in the act interest was collected from the banks on the deposits held by them. No part of the fund, it will be observed, went into the Treasury of the United States or became the property of the United States. It was held in trust separate and apart from the funds of the Government. Such being the case the Secretary of the Treasury has no fund out of which to pay the judgment of this court, as it is not payable out of any Government funds. The debt due on this deposit is not a liability of the United States payable out of its funds. It is payable out of the funds in the hands of the trustees, namely, the funds deposited under the postal savings system, and such regulations as they had promulgated as to withdrawals and conditions of payment."

In the case at bar the United States Attorney and the Special Assistant to the Attorney General of the United States contended, and the Court of Appeals held, directly contrary to the holding in the *Leka case,* that the deposit of money in a postal savings depository creates the relationship of debtor and creditor between the United States and the depositor, and that the United States were, therefore, necessary and indispensable parties to this suit. The Court of Appeals said (R. 118-119):

"The fund in the present case originated in the deposit with the United States by its owners of money subject to withdrawal in all material respects as though it were deposited in a bank. When received, it was in due time deposited by the United States for safe-keeping in a bank, and security was taken for its repayment, all in accordance with the congressional mandate. The statute, under which it was received by the United States, gave the President the right to invest all or

any part of it when in his judgment the general welfare and public interest required. The credit of the United States was pledged for its repayment. This, at the very least, created as between depositor and government the relationship of debtor and creditor, and gave the United States full control of and full responsibility for its disposition."

Obviously the two decisions are directly in conflict on the questions involved, which the Court of Appeals regarded as controlling in this case, namely:

1. Whether postal savings funds constitute money belonging to the United States.

2. Whether a deposit in a postal savings depository creates a debt or liability of the United States.

3. Whether the Secretary of the Treasury has any fund with which to pay a judgment against the United States for postal savings deposits, and, therefore,

4. Whether the United States were necessary and indispensable parties to the suit.

If, as held by the Court of Claims in the *Leka case,* the deposit of funds by a depositor in a postal savings depository does not confer ownership of the deposited funds upon the United States nor create a liability of the United States which can be enforced against the United States in the Court of Claims, it follows that the deposit of those same funds in the Woodlawn bank by a postmaster to the credit of the Postal Savings Trustees was not a deposit of funds of the United States and did not create a debt due from the bank to the United States. Yet the Court of Appeals held that the deposits here involved constituted deposits of money belonging to the United States or in any event created a debtor and creditor relationship between

the bank and the United States. We think that it is impossible to reconcile the two decisions.

The Court of Appeals, in holding that the United States were necessary and indispensable parties to the suit, emphasized that the faith and credit of the United States were pledged for the repayment of postal savings funds. That point was also considered by the Court of Claims in *Annie Leka, Administratrix* v. *The United States, supra,* and disposed of as follows:

> "While the act contained the following provision:
>
> " 'That the faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon, as herein provided,'
>
> "this clearly means that the faith of the United States is pledged to make good any deficiency in case there is a deficiency in the funds; but this does not mean that the United States can be sued by one of the depositors where there is no question about there being sufficient funds on deposit to meet the claim. The United States has nowhere in this act provided for a suit against it or consented to be sued. We might stop here with the conclusion that this court has not judicial power to give judgment. The contract involved is not with the United States. It is a contract providing that the depositor is to be paid out of the funds deposited under the postal saving system, and the act itself and the regulations promulgated in pursuance thereof are written into and became a part of the contract. Under the regulations the money received was deposited to the credit of the board of trustees. (See Finding IX.) The checks and drafts for payment were drawn against this account of the board of trustees."

Thus on this point the decision of the Court of Appeals is again in conflict with the decision of the Court of Claims in the *Leka case.*

## III.

The Court of Appeals confused the issues in this case. The issues presented to and decided by the District Court were (1) whether the United States are necessary parties to a suit by this petitioner to recover possession of assets illegally pledged with and delivered to the Treasurer of the United States, who is ex-officio Treasurer of the Board of Trustees of the Postal Savings System, to secure the repayment of deposits of postal savings funds in the Woodland Trust and Savings Bank; and (2) whether the United States are necessary parties to a suit by this petitioner to recover moneys received by or credited to the account of the Trustees of the Postal Savings System from bonds illegally pledged by Woodlawn Trust and Savings Bank to secure the repayment of deposits of postal savings funds in said bank.

In its opinion, the Court of Appeals finds that the bank was without power to pledge its assets to secure the repayment of deposits of postal savings funds, and such pledging was, therefore, under the decision of the Supreme Court of Illinois in *People ex rel. Nelson* v. *Wiersema Bank,* 361 Ill. 75, 197 N. E. 537, *ultra vires,* illegal and void (R. 115-117). That finding is in accordance with the conclusions of law of the District Court (R. 29). That finding entitled the petitioner herein to an order for the return of the pledged securities held by the Treasurer of the United States because they were wrongfully held by him, and where an officer of the United States wrongfully holds property it is not necessary to make the United States a party defendant in order to recover the same, as hereinafter shown.

Instead of deciding the question involved, *i.e.*, whether the United States had such an interest in or claim to the securities wrongfully held by the Treasurer of the United States as required the United States to be made a party to this suit to recover possession thereof, the Court of Appeals held that the petitioner herein could not recover the pledged securities because the money deposited in the bank, to secure the repayment of which the securities were illegally pledged, was money of the United States, or at least money in which the United States have an interest, and that therefore the United States are indispensable parties (R. 117). This is not a suit to recover any postal savings funds deposited in the bank. Therefore the ownership of those funds was not the determining factor in this case. Even though the United States owned or had an interest in the money deposited in the bank, as held by the Court of Appeals, it acquired no interest in or claim to the securities which were illegally pledged by the bank to secure the repayment of those deposits. If, as held by the Court of Appeals, the pledging of the securities by the bank was *ultra vires*, illegal and void, it is inconceivable that the United States could have or claim an interest in the securities delivered to and held by the Treasurer of the United States under the illegal and void pledge. The property sought to be recovered in this suit consisted of illegally pledged securities—not postal savings funds.

## IV.

The decision of the Court of Appeals is not in accord with the decisions of this Court in other cases involving the question whether the United States were necessary and indispensable parties to suits brought against an instrumentality of the United States or an officer of the United States or an entity holding property in which the United States has an interest.

In concluding that the United States were necessary and indispensable parties to the suit, the Court below said (R. 118):

> "It is not a suit against an individual, who happens to be an official, to recover property wrongfully taken by him under asserted government authority. It is rather a suit to control property which he holds by statutory authority and in which the United States have an interest and as to which he can act only within the limits of the law."

We think that this is an erroneous statement because this is a suit against William A. Julian, who happens to be an official, to recover property which the Court of Appeals finds was wrongfully taken by him under asserted Government authority, and it is not a suit to control property which he holds by statutory authority because the Act of Congress did not authorize him to take illegal pledges to secure deposits of postal savings funds.

The Court holds in effect that the Postal Savings System is an instrumentality in which the United States have an interest and that the United States are therefore necessary and indispensable parties to a suit brought against the Trustees of the Postal Savings System. We think that this conclusion of the Court is not in accordance with the decisions of and the principles laid down by this Court in the following cases: *U. S. Bank* v. *Planters' Bank,* 9 Wheat. 904, 908; *National Bank* v. *Commonwealth,* 9 Wall. 353; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 279; *Sloan Shipyards* v. *U. S. Fleet Corp.,* 258 U. S. 549; *United States* v. *Lee,* 106 U. S. 196; *Davis* v. *Gray,* 16 Wall. 203; and *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381.

The Bank of the United States was an instrumentality of the United States, (*McCullough* v. *State of Maryland,*

4 Wheat. 316), and yet this Court held that the United States was not a party to suits brought by or against the Bank. (*U. S. Bank* v. *Planters' Bank, supra.*) National banks are instrumentalities of the United States, (*Farmers' etc. Nat. Bank* v. *Dearing,* 91 U. S. 29, 33), but the right of a plaintiff to sue a national bank to recover moneys or securities has never been denied on the ground that the bank is an agency or instrumentality of the United States and that, therefore, the suit is, in effect, or in essence, one against the United States; nor has it ever been held that the United States is a necessary party to a suit against a national bank where the only relief sought is against the bank itself. On the contrary the liability of national banks to be sued for debts was expressly stated in *National Bank* v. *Commonwealth, supra,* and in *Davis* v. *Elmira Savings Bank, supra.*

In *Sloan Shipyards* v. *U. S. Fleet Corp., supra,* 258 U. S. 549, this Court said (pp. 566-567):

> "The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn* v.

*Bank of United States*, 9 Wheat. 738, 842, 843; *United States* v. *Lee*, 106 U. S. 196, 213, 221. The opposite notion left some traces in the law, 1 Roll. Abr. 95, Action sur Case, T., but for the most part long has disappeared.

"If what we have said is correct it cannot matter that the agent is a corporation rather than a single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law."

We think that the words of the Court in that case certainly apply to a suit against the Trustees of the Postal Savings System. Instead of creating a corporation, the Act of Congress created a board of trustees, consisting of persons, who are answerable for their wrongful acts, and who can be sued in their capacity as trustees without any express power as in the case of corporations.

In *United States* v. *Lee, supra,* this Court considered the question whether an ejectment suit against individuals holding land as officers and agents of the United States could be maintained, and held that it could be maintained and that the suit was not one in essence against the United States. The Court said (pp. 207-208):

"On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit."

This Court quoted the following from *Davis* v. *Gray*, 16 Wall. 203 (p. 215):

> "'Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* * * *.'
>
> "Though not prepared to say now that the court can proceed against the officer in 'all respects' as if the State were a party, this may be taken as intimating in a general way the views of the court at that time." (Italics ours.)

In the recent case of *Keifer & Keifer* v. *R. F. C.*, *supra*, this Court fully considered its prior decisions in cases where it was contended that the United States were necessary parties to suits against an instrumentality of the Federal Government, or that the instrumentality was immune from suit because such suit was in effect one against the United States. In that case the suit was against a Regional Agricultural Credit Corporation, created by the Reconstruction Finance Corporation pursuant to an Act of Congress. The capital stock of the Regional Agricultural Credit Corporation was owned by the Reconstruction Finance Corporation and its affairs were managed by appointees of Reconstruction Finance Corporation. The suit was one in tort against a Regional Agricultural Credit Corporation. In holding that Regional Agricultural Credit

Corporation was not immune from suit on the ground that it was an instrumentality of the Federal Government, this court said:

> "* * * the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. *United States* v. *Lee*, 106 U. S. 196, 213, 221; *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 567.
>
> * * *
>
> "Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so? * * *
>
> * * *
>
> "* * * We should be denying the recent trend of Congressional policy to relieve Regional from liability."

Neither does the fact that the Treasurer of the United States is a party to the suit require that the United States be made a party thereto.

The Treasurer of the United States is, by the Act of Congress creating the Postal Savings System, constituted the Treasurer of the Board of Trustees. (Sec. 759, Title 39, U. S. Code.) The assets delivered to him by the Woodlawn bank were delivered to him merely as pledgee and not to be covered into the United States Treasury as property belonging to the United States or to be disbursed in accordance with any Act of Congress. He recognized the capacity in which he received those assets by issuing receipts therefor which recited that he received them "in trust for this bank," meaning in trust for the Woodlawn bank (R. 26, Add. R. 18). This suit against the Treasurer of the United States was, therefore, not one to recover

funds or property of the United States in his hands, but was a suit to recover from him property which had been illegally pledged with him and which he holds as pledgee in trust for the Woodlawn bank to secure deposits to the credit of the Trustees—not deposits to the credit of the United States—in the Woodlawn bank, and which, because of such illegal pledging, it is his duty to return to the receiver of the Woodlawn bank.

We think that under the decisions of this Court in *Houston* v. *Ormes*, 252 U. S. 469 and *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121, the United States are not necessary and indispensable parties to this suit.

In *Houston* v. *Ormes, supra,* a suit in equity was brought by Lockwood in the Supreme Court of the District of Columbia to establish an equitable lien for attorney's fees upon a fund of $1,200 in the Treasury of the United States, appropriated by Congress to pay a claim found by the Court of Claims to be due to one Sanders, who was made defendant with the Secretary of the Treasury and the Treasurer of the United States. The principal contention was that because the object of the suit and the effect of the decree were to control the action of the Secretary of the Treasury and the Treasurer of the United States in the performance of their official duties, the suit was in effect one against the United States, but this Court held otherwise. The Court said (p. 472):

> "But since the fund in question has been appropriated by act of Congress for payment to a specified person in satisfaction of a finding of the Court of Claims, it is clear that the officials of the Treasury are charged with the ministerial duty to make payment on demand to the person designated. It is settled that in such a case a suit brought by the person entitled to the performance of the duty against the official

charged with its performance is not a suit against the government."

In *Orinoco Co.* v. *Orinoco Iron Co.*, 296 F. 965, the Court had before it a case in which suit was brought by the Orinoco Iron Company against the Secretary of the Treasury and the Treasurer of the United States to recover moneys which had been paid into the Treasury of the United States as a trust fund to be distributed among the beneficiaries under a protocol between the United States and Venezuela whereby Venezuela agreed to pay to the United States $385,000 as damages resulting from the action of revolutionists in dispossessing certain concessionaires and the subsequent action of Venezuela in canceling the concessions. The Secretary of the Treasury and the Treasurer of the United States challenged the jurisdiction of the court on the ground that the suit was in essence a suit against the United States and that the United States was a necessary party, but the court said (p. 972):

> "The iron company is not seeking in this suit to recover anything from the United States. It is conceded, and properly so, that the money in question is held in the treasury as a trust fund. The government has no claim to it and it makes none. No matter what the outcome of the suit might be, the government would receive none of the fund. For this reason the suit is not against the United States, as argued by the appellants."

Upon appeal by the Secretary of the Treasury and the Treasurer of the United States, this Court, in *Mellon* v. *Orinoco Iron Co., supra,* affirmed the decree of the lower court upon the authority of *Houston* v. *Ormes, supra.*

We therefore respectfully submit that the decision of the Court below is not in accord with the decisions of this Court in the cases hereinbefore discussed.

V.

The decision of the Court of Appeals is in conflict in principle with the decisions of the Second and Fifth Circuit Courts of Appeal on the question whether the United States are necessary and indispensable parties to suits brought against government instrumentalities or entities holding property in which the United States have an interest. In *Panama R. Co.* v. *Minnix*, (C. C. A. 5) 282 F. 47, the Circuit Court of Appeals considered a suit brought against a corporation in which the United States was the sole stockholder and held:

> "The liability of the Panama Railroad Company to suit, as any other railroad company, and its property to seizure, is not affected by the fact that the United States is the sole stockholder."

In *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.*, 294 F. 641, the United States Circuit Court of Appeals for the Second Circuit held that the United States is not a necessary and indispensable party in a suit brought against an instrumentality of the United States.

**CONCLUSION.**

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOMER D. DINES,
122 South Michigan Avenue,
Chicago, Illinois.

LLEWELLYN A. LUCE,
937 Munsey Building,
Washington, D. C.
*Counsel for Petitioner.*

WARREN H. ORR,
*Of Counsel.*